INDEX

CITATIONS

625100—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 750

ENGINEERING & RESEARCH CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 219) is reported in 145 F. (2d) 271. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–10) are reported in 55 N. L. R. B. 137.

JURISDICTION

The decree of the court below (R. 220–221) was entered on October 12, 1944. The petition for a writ of certiorari was filed on December 12,

1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that petitioner dominated and interfered with the formation and administration of, and contributed support to, a labor organization of its employees in violation of Section 8 (2) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor

organization or contribute financial or other support to it: * * *

* * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

* * * * *

STATEMENT

Upon the usual proceedings, the Board, on February 29, 1944, issued its findings of fact, conclusions of law, and order (R. 1–10). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

In May 1943, the United Automobile, Aircraft & Agricultural Implement Workers, affiliated

with the C. I. O., and herein referred to as the C. I. O., launched a campaign to organize petitioner's plant (R. 4; 18–19, 24–25, 82). Shortly thereafter an unaffiliated labor organization, the Aircraft Workers Council, hereinafter called the Independent, came into existence (R. 3, 4; 51, 66–67). About 30 employees in the various departments circulated among the employees on all three shifts a petition which designated the Independent as bargaining agent (R. 4; 36–37, 68–69). The solicitations on Independent's behalf were, for the most part, carried on during working hours and with widespread tolerance on the part of petitioner's supervisory force (R. 4, 6; 13–14, 25–26, 34–37, 68–69, 70–71). Indeed, a number of instructors and leadmen, who were supervisory employees (*infra*, pp. 7–9), assisted in circulating the Independent petition (R. 4; 40, 46, 69).[1] Petitioner took no effective steps to dissipate the natural tendency of the employees to presume therefrom that petitioner approved what was being done (R. 7; 88, 90). As a result of this widespread use of petitioner's time and property in the solicitation of members and the assistance given to the Independent by members of petitioner's supervisory force, the signatures of 1,064 of petitioner's approximately 1,800 employees were obtained within two days (R. 4, 6–7; 35, 58, 63, 92).

[1] A few of these supervisory employees themselves signed the petition (R. 13–14, 43, 80–81).

After the signatures had been obtained, the Independent elected officers (R. 4–5, 6; 31–32, 92), most of whom were either supervisory employees or held positions close to management; none of them was a production employee. Thus Anders, an inspector, was elected president (R. 31–32); Van Horn, supervisor of accounts, was elected vice president (R. 6; 32, 55); Basile, a leadman, was elected secretary (R. 5; 32, 62, 64–65); and Huber, assistant purchasing agent, was elected treasurer (R. 6; 32, 49, 51). On May 31, Van Horn and Huber offered to resign "because of their close connections with the office," but their resignations were not accepted (R. 6; 93–94).[2] Again assisted by supervisory employees, the Independent conducted elections for "delegates" or representatives in the various departments during working hours (R. 4, 6; 41, 43–44, 48).[3]

Although instructions were given to supervisors that the employees had a right to discuss unions whenever they wanted to without interference from management, so long as such activities did not interfere with production (Pet. 4–5),

[2] Supervisor Van Horn resigned his position as vice president on July 15, after charges had been filed alleging that the Independent was company-dominated (R. 6; 32).

[3] Instructors Kaminer and Geary assisted in the distribution of ballots, suggested nominees, and counted the ballots after they were cast (R. 43–44, 48).

petitioner's policy as thus announced was not, as the Board found, applied equally as between the C. I. O. and the Independent (R. 7).[4] Shortly after the C. I. O. commenced its membership campaign, petitioner's head guard learned that a group of women employees intended to discuss the C. I. O. in the rest room and instructed Guard Mosley to attend (R. 4, 7; 19). She attended pursuant to instructions, and disbanded groups discussing the C. I. O. (R. 4, 7; 19–20, 22–23).[5] Likewise indicative of petitioner's lack of neutrality in the organizational campaigns of the two labor organizations, is its treatment of employee Rappaport, one of the most active of the C. I. O. adherents (R. 4, 7; 24–25). Rappaport was warned by Supervisor Bittenbender in the presence of other employees that he should not solicit C. I. O. memberships "on company time or in the plant" because such activities would be in violation of petitioner's Rule 8 which forbade employees from doing "work of a personal nature . . . without an order" (R. 4, 7; 35, 61–62). This admonition was, of course, not in line with petitioner's professed policy of permitting employees to discuss unions whenever

[4] In no instance does it appear that the instructions were made known to the ordinary employees (R. 7; 88, 90).

[5] Most of the employees present were utilizing their regular rest period which petitioner permitted each employee (R. 23).

they wanted to so long as such discussions did not interfere with production (*supra*, p. 5).[6]

The Board found that petitioner is accountable for the above-described conduct of its leadmen, instructors, and other employees close to the management (R. 5, 6). The leadmen and instructors assist the foremen in the operation of their respective departments (R. 5; 86)[7] Superintendent Stout recognized the supervisory status of leadmen by requesting foremen under him to convey to the leadmen petitioner's instructions regarding noninterference with union activities (R. 5; 88–89, 91). Although President Wells characterized leadmen as "working foremen," neither leadmen nor instructors perform any manual work but, under the direction of a foreman or supervisor, devote their time to supervising, instructing, and assigning work to groups of employees (R. 5; 38–39, 42–43, 59, 65, 78–79,

[6] Shortly thereafter, another supervisory employee, Instructor Baggett, checked up on Rappaport's activities by inquiring of an employee whether "Rappaport had talked any C. I. O. to [him] during working hours" (R. 26). This same supervisory employee later not only failed to stop the circulation of a petition in behalf of the Independent in his department during working hours, but himself signed the petition (R. 13–14).

[7] Leadmen and instructors both have substantially the same functions and responsibilities and, as between those here involved, there is no discernible difference. In fact, the term "leadman" is frequently used throughout the record in referring to a particular instructor or to the position held by an instructor (R. 5; 12, 42, 43, 48, 78–80).

81, 85–86).[8] They also take the place of the foremen and supervisors when the latter are absent from their departments (R. 5; 79). As in the case of foremen, their time is charged to nonproduction, whereas the time of production employees is charged to the particular part or instrument on which the employee worked (R. 5; 14–15, 39). Leadmen and instructors are responsible for the work of the men under them, and it is their duty to report on the aptitude of the employees under them; they may also recommend raises in pay (R. 5; 15–16, 27, 39–40, 65, 79). A number of them had reported to their foreman or supervisor the employees whom they considered incapable of properly performing their work; the foreman or supervisor thereupon transferred or discharged the unsatisfactory employees (R. 5; 13, 16, 28, 65). In no instance does it appear that such a report by the leadman or instructor failed to result in a transfer or discharge of the employee complained of. From these facts, the Board concluded that leadmen and instructors have power effectively to recommend changes in the status of production employees working under them, that they exercise such power, and that the production employees had just cause to believe that leadmen and in-

[8] The employees working under each leadman or instructor range in number from about five to twenty (R. 5; 12, 38, 42, 81).

structors were representatives of management (R. 5).

In the eyes of the employees generally, Supervisor Van Horn (vice president of the Independent) and Assistant Purchasing Agent Huber (treasurer of the Independent) were likewise representatives of management. Huber is one of two assistant purchasing agents employed by petitioner (R. 6; 50). He purchases materials requisitioned by the planning department in amounts up to $10,000, and uses his own judgment in ordering the materials from available sources (R. 6; 50–51). He is a salaried employee and occupies an office directly in front of that of petitioner's treasurer (R. 6; 50, 51). Van Horn, as supervisor of accounts, is also a salaried employee (R. 6; 55). Both Van Horn and Huber considered themselves close to management (R. 6; 52). As shown, *supra,* p. 5, "because of their close connections" with management, both Huber and Van Horn offered to resign their offices in the Independent and, although their resignations were not then accepted, Van Horn later effectively resigned (*supra,* note 2). Huber continued to hold his position as treasurer of the Independent (R. 6; 51). The Board concluded that Huber and Van Horn "are closely associated and identified with management and that it reasonably appeared to the other employees that they

were in fact representatives of management" (R. 6).

Upon the foregoing facts, the Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act and entered its order directing petitioner to cease and desist from engaging in such unfair labor practices, to withdraw recognition from and disestablish the Independent, and to post appropriate notices (R. 9–10). Thereafter, the Board filed a petition for enforcement in the court below (R. 215–218). On October 12, 1944, the court delivered its *per curiam* opinion (R. 219–220), and entered its decree (R. 220–221) enforcing the Board's order in full.

ARGUMENT

1. Petitioner's contention (Pet. 2–5) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp. 3–10) affords full support for the challenged findings. Contrary to petitioner's contention (Pet. 4–5), it is clearly responsible for the conduct of its supervisors.[9] The Company's

[9] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 519, 520; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79–80; *Birmingham Post Co.* v. *National Labor Relations Board*, 140 F. (2d) 638, 639–640 (C. C. A. 5).

unenforced instructions of impartiality were not communicated to the employees and, therefore, did not neutralize the normally coercive effects of such conduct upon the employees.[10]

2. Petitioner attempts to place a novel interpretation upon the decisions of this Court in the *International Association of Machinists, Link-Belt,* and *Heinz* cases,[11] asserting that they apply "only when the Board has found that the employer was guilty of unfair labor practices by interference, restraint, coercion and domination of the formation of the union by means of threats of discharge, transfer, discipline or discrimination against the employees, or other change in the status of an employee" (Pet. 6). No court has so held. Interference and domination need not be flagrant before an employer may be held responsible for the activities of its supervisory employees; it is sufficient that "The employees

[10] See *Heinz* case cited *supra*, note 9; *Solvay Process Company* v. *National Labor Relations Board*, 117 F. (2d) 83, 85 (C. C. A. 5), certiorari denied, 313 U. S. 596; *Consumers Power Company* v. *National Labor Relations Board*, 113 F. (2d) 38, 44 (C. C. A. 6); *National Labor Relations Board* v. *Cities Service Oil Co.*, 129 F. (2d) 933, 936 (C. C. A. 2); *North Carolina Finishing Co.* v. *National Labor Relations Board*, 133 F. (2d) 714, 716 (C. C. A. 4), certiorari denied, 320 U. S. 738.

[11] *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 599; *H. J. Heinz Company* v. *National Labor Relations Board*, 311 U. S. 514, 520.

would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management * * *". *International Association of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 80. There is nothing in the decision of the court below which is in conflict with these cases; that decision conforms to the criteria enunciated by this Court.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decisions nor any question of general importance. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
ELEANOR SCHWARTZBACH,
Attorneys,
National Labor Relations Board.

JANUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945